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## Cahn: The Moral Decision

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THE MORAL DECISION. By *Edmond Cahn*. Bloomington: Indiana University Press. 1955. Pp. ix, 342. \$5.

Seeking to uncover a previously untouched source of moral knowledge, Professor Cahn turns to "the supply of moral insight and experience that American courts have gradually developed and accumulated."<sup>1</sup> The method he adopts to work this mine is not unlike the case method employed by the majority of American law schools. A digest of an actual case is presented which serves to dramatize and illustrate a moral problem. This problem is then discussed in the light of the court's solution and is amplified through analogous cases and logical analysis. Ranging over a broad field Professor Cahn treats a score of major moral problems which confront the courts. This method of developing his thesis is indeed stimulating, but the reader finds that the solutions which the law reaches are more often criticized by Professor Cahn than not. He admits the failings which he himself discovers in the legal decisions, but seeks to excuse them by pointing to the fact that the cases are designed to focus on the problems and not necessarily to provide illustrations of correct moral decisions. In the light of the book's stated purpose—to reveal the rich repository of moral knowledge in the law—this admission is disappointing.

The project which Professor Cahn outlines for himself fails of complete accomplishment because of deficiencies in the assumptions upon which he bases his analysis. He is correct in assuming that the law can provide moral guides, but he fails to recognize the full implications of this fact in two respects. While we can study the law's moral decisions in an attempt to find a guide for our own, the law's important educative effects do not result from such conscious efforts on our part.<sup>2</sup> Its primary influence on moral precepts is more subtle. The law prescribes required standards of conduct and these standards are generally followed without any conscious recognition by the community of their moral significance. Yet these prescribed patterns of conduct are eventually accepted as morally "right" largely because the community becomes accustomed to follow them. Professor Cahn also underestimates the importance of the functional inter-relationship between these moral and legal standards. Law is teleological; it is a device for "social engineering"<sup>3</sup> which is guided in part by the community. As a result, the moral guides which Professor Cahn seeks to derive from the law may not be results independently arrived at by the courts, but only the moral precepts of the community reworked by the legal machinery.<sup>4</sup>

Professor Cahn argues that the legal system offers an illustration of a proper method for treating moral questions. He points to the law's stress

<sup>1</sup> CAHN, THE MORAL DECISION 3 (1955).

<sup>2</sup> COHEN, M., REASON AND LAW 164 (1950); PETRAZYCKI, LAW AND MORALITY, vol. VII of 20th Century Legal Philosophy Series, 93-100 (1955).

<sup>3</sup> POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, rev. ed., 47 (1954).

<sup>4</sup> CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, Lecture III (1921).

on what is improper, rather than proper, conduct. He finds its method adaptable to the individual's psychologic "constitution." He applauds the concreteness, preciseness, decisiveness, and responsibility which are developed by its procedures. The difficulty with his analysis is that he assumes that these are qualities peculiar to the legal method. In reality he is only abstracting the logical foundations of the legal thought process, the inductive and deductive bases underlying any sound attempt at reasoning.<sup>5</sup> Of course there is nothing wrong in drawing an analogy between the system of thought as developed in the law and one which might be employed in the field of morals, providing the proper limitations on the analogy are maintained. There is a danger, however, that distinctions will be forgotten and ideas suited to only one area will be applied in another. It was for this reason that Holmes felt it would probably be "a gain if every word of moral significance could be banished from the law. . . ."<sup>6</sup> Equal confusion confronts the moralist who uncritically accepts legal methods and ideas. Even if Professor Cahn chooses to ignore the fact that the law has no monopoly on sound thinking and that there are dangers inherent in analogizing law to morals, he should at least extend his inquiry to include the legislative as well as judicial process. Implicitly accepting, as he does, the "realists'" definition of law as "a decision of a court"<sup>7</sup> the importance of legislation in determining that decision still demands some study of the procedures employed to ascertain the moral standards which are supplied to the bench.

The most significant defect in Professor Cahn's analysis, however, is his assumption that the legal precepts he employs as illustrations of moral decisions somehow attain their moral significance without reference to norms external to the legal system.<sup>8</sup> A legal decision is not "right" merely because it has been reached in accordance with the law's procedures; the courts are not dealing in syllogisms. Even assuming that the result would be morally correct if a product of a properly functioning legal machinery, the product would be deficient in most cases due to the defects in the machinery itself. Professor Cahn would be the first to admit these facts.<sup>9</sup> Unfortunately, except for his own predilections as to the correct legal solutions of the moral problems presented, he offers no hint of what external norms should be employed.<sup>10</sup> In the light of the fact that Professor Cahn really does not state why one legal solution is better than another it is difficult to see how the law will offer any great assistance to the moralist by way of illustrating proper modes of conduct.

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<sup>5</sup> RUSSELL, *THE PROBLEMS OF PHILOSOPHY*, cc. VI-VIII (1936).

<sup>6</sup> HOLMES, *COLLECTED LEGAL PAPERS* 179 (1920).

<sup>7</sup> FRANK, *LAW AND THE MODERN MIND* 46 (1930).

<sup>8</sup> COHEN, F., *ETHICAL SYSTEMS AND LEGAL IDEALS* 40-42 (1933).

<sup>9</sup> CAHN, *THE MORAL DECISION* 245, 246 (1955).

<sup>10</sup> Compare STAMMLER, *THE THEORY OF JUSTICE*, *Modern Legal Philosophy Series*, 112 et seq. (1925).